CASE NO. 13-20-00280-CR

IN THE COURT OF APPEALS
FOR THE THIRTEENTH DISTRICT
AT CORPUS CHRISTI, TEXAS

ELIJAH TATES

V.

STATE OF TEXAS

Appeal from the 85th Judicial District Court of
Brazos County, Texas
Cause No. 16-05720-CRF-85

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

Identity of Parties and Counsel

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Statement of the Case[1]

Elijah Tates was indicted on December 15, 2016 for the felony offense of Evading Arrest occurring on September 29, 2016, enhanced by previous conviction for the same offense to a third degree felony. (CR 4). The indictment contained two additional enhancement paragraphs raising the punishment range, if proven, to a second degree felony. (Id.).

The case was tried to a jury on the first phase on January 27-29, 2020. (2-4 RR). Tates was found guilty of the charged offense. (4 RR 41). Punishment was to the Court and a hearing was conducted on April 7, 2020. (CR 58-59). Tates was sentenced to five years in prison. (5 RR 97). Tates timely filed Notice of Appeal. (CR 121-22).

This appeal ensues.

[1] The Clerk's Record is referred to as "CR" and the Reporter's Record as "RR." The first number appearing with the Reporter's Record is volume, with the numbers following page numbers. The State's exhibits are referred to as "SX."

Statement Regarding Oral Argument

As this appeal involves a unique application of Article 38.23 of the Texas Code of Criminal Procedure instructions to the jury, oral argument would assist in the resolution of the appeal. Issue Two appears to be one of first impression and occasioned by the COVID-19 pandemic. Appellant requests the granting of oral argument.

Issues Presented

Issue One

State v. Iduarate, 268 S.W.3d 544, 551 (Tex. Crim. App. 2008) held "[E]vidence showed a subsequent independent criminal act that was not causally connected to any unlawful entry by a state agent occurred." In this case there was a connection between the alleged unlawful act of attempting to detain Appellant. Did the Trial Court commit error in failing to instruct the jury on Article 38.23 of the Texas Code of Criminal Procedure as requested by Appellant because the initial detention and the commission of a criminal offense were temporally interconnected?

Issue Two

Tates appeared by remote video conferencing at the punishment phase of trial, violating his rights to be personally present for his trial under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, Art. I, Sections 10 and 19 of the Texas Constitution and Art. 33.03 of the Texas Code of Criminal Procedure and his absence was category one or two *Marin* error not subject to procedural default

Statement of Facts

The evidence from the first phase of trial was undisputed except as to a single crucial fact: Was the initial detention of Tates illegal?

Officer Liam Stewart of the Bryan Police Department ("Stewart") testified that on September 29, 2016 he was assigned to a zone in the southwest side of Bryan, Texas designated as "6 Adam Zone" and had been assigned to that zone for three years. (3 RR 15-16). The State introduced State's Exhibit One to assist in visualizing the zone, (SX1; 3 RR 17) reproduced below. Stewart described the area bound by Peppertree, Cypress Bend, Poplar and Verde as a high crime area. (3 RR 16). Stewart testified he was doing crime suppression or proactive enforcement the night he encountered Tates. (Id.). The area is located on State's Exhibit One near the top center, oriented by the hands of a clock at the 12:00 position and about a quarter of the way from top vertical of the image as it appears below:

Stewart testified he was set up at the intersection of Forestwood and Peppertree near a stop sign that was commonly disregarded. (3 RR 18). Tates was driving a white Honda that was travelling down Peppertree and made a prolonged stop at the stop sign located there. (3 RR 19-20). Stewart testified the driver of the white Honda, Tates, made sure while at the stop sign that "it was aware of me" (Id.), then proceeded down Peppertree and failed to signal a right turn onto Verde Street. (3 RR 21). Stewart testified the white Honda also accelerated. (Id.).

Stewart testified the white Honda turned left into a parking lot at 1107 Verde, near the intersection of Silver Spur Circle, into a large apartment complex that takes up the entire block. (3 RR 21-22). Stewart testified the white Honda stopped in the middle of the roadway and then indicated a left turn, also a traffic violation. (3 RR 22). The white Honda turned into the complex, turned into one of the vacant parking spots, the driver exited and ran. (3 RR 23). Stewart's overhead lights were on and the siren "chirped" at the time the white Honda turned into the parking lot at 1107 Verde. (3 RR 27-28).

Stewart clarified on cross-examination he originally proceeded down Peppertree to Forestwood to Verde, and the distance from Forestwood to Verde is short, perhaps just half a block. (3 RR 32). Stewart would have had to turn left and jog right almost immediately to follow the direction that he testified. (3 RR 32). Stewart testified he was set up originally around fifty feet down Forestwood when he first encountered the white Honda. (Id.).

Prior to resting, the State had admitted into evidence a prior Judgment of Evading Arrest naming Tates as the defendant in Cause Number 04-4300-CRM-85, dated January 24, 2007. (SX 11; 3 RR 57). A written stipulation that Tates was the individual convicted in the Evading Arrest case was admitted into evidence. (SX 12; 3 RR 57).

Tates testified he was in the area of Peppertree, Forestwood and Verde to visit an ex-girlfriend. (3 RR 60). She lived on Sprucewood near the area Stewart stopped

the car he was driving. (Id.). He testified he stopped at the stop sign at Peppertree and Forestwood, but denied staring at Stewart. (3 RR 61).

Tates testified he made a legal, signaled left turn, and noticed the police unit, which Tates testified was parked much further down Forestwood than fifty feet. (3 RR 61). Tates testified the unit was five or six houses down from the intersection – a distance of several hundred feet. (Id.). After turning right onto Forestwood, Tates testified he took an immediate left turn onto Verde and legally signaled the turn. (3 RR 62). Tates testified he immediately turned on the left hand turn signal after turning off of Forestwood. (Id.).

Tates testified the distance is about two-hundred fifty feet from that intersection to the entrance to the Verde Apartments where he turned again. (3 RR 63-64). He again used his signal. (Id.). Tates testified there was no traffic violation at the intersection of Forestwood and Verde or the intersection of Verde and the Verde Apartments where he turned. (3 RR 64). Tates admitted to jumping out of the car and running. (3 RR 65). Tates also admitted he had marijuana in the car and that was why he ran. (3 RR 78). At the time he ran he knew the lights were activated on the patrol unit. (3 RR 79).

At formal charge conference Tates requested an Article 38.23 instruction on this factual dispute. (4 RR 4, 14). The Trial Court denied the request. The jury was instructed without the requested Article 38.23 instruction. (CR 63-71). The jury returned a verdict of guilty and were polled. (4 RR 41-42).

Punishment was to the Court on April 7, 2020, post COVID-19. (5 RR 6 [THE COURT]: "As usual we are live on YouTube TV."]). The State called four witnesses. Tates' original bond had been revoked after conviction, he was in jail and not physically present in the Courtroom for the punishment phase of his trial. (4 RR 6-7). No objection was heard on that basis. (Id.). All witnesses appeared by remote video. (5 RR 6-7). This forms the basis of Issue Two below and further discussion is deferred.

Tates entered a plea of "not true" to the two punishment enhancement paragraphs. (5 RR 9-10). To prove up the enhancements, testimony was introduced by the State that Tates was in fact the individual previously convicted in Cause Number 04-05095-CRF-85, a third degree felony, and Cause Number 07-00293-CRF-85, a second degree felony. Tates testified on his own behalf at the punishment hearing. (5 RR 60-92).

Following the taking of evidence, the Trial Court found the enhancement paragraphs to be "true" and sentenced Tates to five years in prison. (5 RR 97).

Summary of Argument

The sole disputed fact issue in the first phase of Tates' trial was whether Tates used the blinkers in his white Honda in a legally required manner. Tates testified he did, Stewart testified Tates did not. It was a classic fact issue. The case law relied on by the Trial Court in denying Tates' requested instruction is distinguishable in both fact and law. That the disputed fact issue arose before the formal charge occurred does not change the illegality, or attenuated the taint of the subsequent formal charge that Tates was tried. The instruction should have been given, it was error not to do so, and Tates was legally harmed by the error.

The first phase of trial concluded January 29, 2020 prior to the COVID-19 outbreak. Punishment was to the Trial Court and held April 7, 2020 after the Governor's State of Emergency and the Texas Supreme Court's Emergency Orders that began on March 13. 2020. Tates' original bond had been revoked and new bond required following his conviction.

Tates was incarcerated at the Brazos County Jail during the punishment phase of trial. He appeared remotely by the internet application Zoom. He was the sole trial court principle to appear remotely. He testified this way. There was no affirmative waiver of the constitutional and statutory requirement that he be present at trial. Remorse and rehabilitation were central to the defense punishment case in which Tates was the only defense witness. The Trial Court was unable to observe the subtleties of his crucial testimony.

Argument

Issue One

State v. Iduarate, 268 S.W.3d 544, 551 (Tex. Crim. App. 2008) held "[E]vidence showed a subsequent independent criminal act that was not causally connected to any unlawful entry by a state agent occurred." In this case there was a connection between the alleged unlawful act of attempting to detain Appellant. Did the Trial Court commit error in failing to instruct the jury on Article 38.23 of the Texas Code of Criminal Procedure as requested by Appellant because the initial detention and the commission of a criminal offense were temporally interconnected?

A. The Trial Court committed charge error in failing to give the jury Tates' requested Article 38.23 instruction

At the formal charge conference, the Trial Court was specific concerning the reason for denying Tate's requested Article 38.23 instruction. (4 RR 11-12; 14-15; CR 56-57):

> I think the cases are controlling are the *Biscamp* case -- which for appellate purposes I'm going to cite as 219 Texas App Lexis 1463, 10th Court of appeals case -- and the *Foster* case which is 213 Texas App Lexis 1139. And then it also recites to the *Iduarte* case which I think is the one that kind of started this, which is I-d-u-a-r-t-e, 268 S.W.3d 544.

(6 RR 11).

Biscamp v. State is an unpublished case – without precedential value – decided by the Tenth Court of Appeals. No. 10-17-00358-CR, 2019 WL 962298 (Tex. App. – Waco February 27, 2020, no pet.) (not designated for publication). *Biscamp* originated from the same Trial Court as this case and involved an evading arrest prosecution. However, its outcome was based on *Iduarte v. State,* 268 S.W.3d 544, 550-51 (Tex.

Crim. App. 2008). *Iduarte* neither supports the heavy lifting the Tenth Court of Appeals attributes to it, nor the Trial Court in this case.

Iduarte involved a formally charged aggravated assault on a peace officer prosecution. *Id.* at 546. The facts of that case were disputed as to the alleged assault, less so regarding the context of the alleged assault. *Iduarte* at 546-47. Officers responded to a domestic disturbance at an apartment, finding two men and woman outside. Iduarte, one of the men, was taken into custody. Officers then entered the apartment with defendant and he managed to secure a pistol that he allegedly pointed at one of the two officers inside the apartment. *Id.*

At trial, the defendant sought to suppress, arguing the entry was illegal based, among other reasons, on Article 38.23 of the Texas Code of Criminal Procedure. TEX. CODE CRIM. PRO. ART. 38.23. The trial court agreed, the State appealed, and the intermediate Court of Appeals reversed. *Id.* at 548. The Court of Criminal Appeals affirmed the Court of Appeals decision, writing with language later used by the Tenth Court of Appeals in *Biscamp*:

> Here, evidence of the charged offense did not exist before the officer's challenged actions because the charged offense had not yet occurred; the evidence showed a subsequent independent criminal act that was not causally connected to any unlawful entry by a state agent. Therefore, the exclusionary rule does not apply to this case.

Id. at 551.

Biscamp was before the Tenth Court of Appeals on a trial court ruling denying two requested jury instructions under Art. 38.23. *Id.* at *1. The formal charge in that

case was Evading Arrest – Motor Vehicle. *Id.* The initial attempt to stop for speeding was the legal issue forming the basis of the defendant's requested instructions. The Court of Appeals, citing the language quoted above, affirmed the trial court denial of the instruction. *Id.* at *3.

The decision in *Biscamp* is not binding precedent. It is only persuasive authority. However, the logic and holding of the Court of Criminal Appeals in *Iduarte* compels neither the outcome decided in *Biscamp* nor here.

In *Iduarte*, there was causal break in the illegality and the evidence sought to be suppressed. Specifically, "[T]he evidence showed a subsequent independent criminal act that was not causally connected to any unlawful entry by a state agent." *Iduarte* at 551. In other words, the illegal entry into the apartment by police was attenuated from the later decision by the defendant to point the pistol at the officer. *Id.* at 550.

That *Iduarte* is not a bright-line rule dependent on whether the formally charged criminal activity occurred before or after the illegal law enforcement activity that is the subject of the Article 38.23 instruction. This is borne out by the case central to the *Iduarte* decision, *Wong Sun v. United States*, 371 U.S. 471, 486, 83 S.Ct. 407 (1963). The Court in *Iduarte* cites *Wong Sun* for the proposition that "[exclusionary rule] does not, however, provide limitless protection to one who chooses to react illegally to an unlawful act." [citing *Wong Sun* at 371 U.S. at 486].

Wong Sun specifically dealt with and coined the term "fruit of the poisonous tree" doctrine. Separate from that now ubiquitous phrase, the case specifically dealt

with verbal evidence and the Supreme Court of the United States phrased the legal issue as "Thus verbal evidence which derives immediately from an unlawful entry and unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality that the common tangible fruits of the unwarranted intrusion." *Id.* at 485.

Further in application, the government in *Wong Sun* argued attenuation of the illegal conduct attributed to them and the evidence, a statement from a co-defendant that led to the discovery of narcotics. *Id.* at 486. The Supreme Court torpedoed this contention by noting "[the co-defendant] had been almost immediately handcuffed and arrested. Under such circumstance it is unreasonable to infer that [the co-defendant] response was sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Id.*

In other words, in *Wong Sun* it was lack of attenuation of the illegality to the evidence that was crucial. In this case, unlike *Iduarte*, the alleged fact issue, the illegality of Tates' detention, are not just linked logically, they are temporally interwoven. To the extent the Tenth Court of Appeals and the Trial Court in this case relied on *Iduarte* and *Wong Sun* in *Biscamp*, that reliance was misplaced.

The illegality made the basis of Tates' requested instruction was necessary precisely because it was interwoven both temporally and contextually with his charged crime. That, as the Trial Court intimated, he received "two bites at the apple" (6 RR 11) is of no moment. Under the logic and holding of *Wong Sun*, and by extension,

Iduarte, Tates was entitled to the Article 38.23 instruction regardless of whether the alleged crime occurred before or after the alleged police illegality.

B. *Almanza* charge error occurred as a result of the Trial Court's failure to give the Art. 38.23 instruction

Under the applicable standard of harm, if error has been preserved, the reviewing court will reverse if the error resulted in "some harm" to the defendant. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). Trial Counsel preserved charge error by objecting and requesting the instruction. (4 RR 11-12; 14-15; CR 56-57). Therefore, this standard is the measure of harm. It is present in this case.

Although the Trial Court noted that lawful arrest was part of the elements of the crime alleged to have been committed by Tates, the jury was not told specifically they were required to disregard evidence of illegality unless they decided beyond a reasonable doubt than none occurred. This deprived Tates of the opportunity to specifically argue the factually disputed stop could not be used as a basis for the detention of Tates' white Honda.

This argument had been the sole disputed fact issue in the first phase of trial. Without this specific argument to deploy, Trial Counsel was without essentially what he had argued to the jury from the beginning of jury selection: that Tates had not violated the law and that evidence should not be considered under applicable Texas law. This was the central contested issue in the case.

Issue Two

Tates appeared by remote video conferencing at the punishment phase of trial, violating his rights to be personally present for his trial under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, Art. I, Sections 10 and 19 of the Texas Constitution and Art. 33.03 of the Texas Code of Criminal Procedure and his absence was category one or two *Marin* error not subject to procedural default

A. Tates' Constitutional and statutory right to be present during all phases of trial

Tates had a Sixth and Fourteenth Amendment and Art. I, Sec. 10 right to be present during the punishment phase of his felony trial. U.S. CONST. AMEND. VI, IX; TEX. CONST. ART. I, § 10. These rights are grounded in both confrontation and effective assistance of counsel. Texas Courts have recognized the constitutional dimension of this right:

> In all felony prosecutions, Texas law requires the defendant's personal presence at trial, except "when the defendant voluntarily absents himself after pleading to the indictment or information, or after the jury has been selected when trial is before a jury." TEX. CODE CRIM. PROC. ANN. art. 33.03 (West 2006). "[W]ithin the scope of the right of confrontation is the absolute requirement that a criminal defendant who is threatened with loss of liberty be physically present at all phases of proceedings against him, absent a waiver of that right through defendant's own conduct." Baltierra v. State, 586 S.W.2d 553, 556 (Tex.Crim.App.1979) (citation omitted); see U.S. CONST. amend. VI; TEX. CONST. art. I, § 10.

Fulmer v. State, 401 S.W.3d 305, 314 (Tex. App. – San Antonio 2013, pet. ref'd).

The Texas Supreme Court has recognized the presence of a defendant in the context of a contempt proceeding has a due process and statutory right to be present

at their trial. *Ex parte Johnson*, 654 S.W.2d 415 (Tex. 1983); U.S. CONST. AMEND. V, XIV; TEX. CONST. ART. I, § 10; TEX. CODE CRIM. PRO. ART. 33.03 (holding a violation of federal and State Constitution and Article 33.03 in contempt proceeding where civil defendant was tried *in absentia*).

The Texas Code of Criminal Procedure statutorily requires a defendant's presence is mandatory throughout their trial:

Art. 33.03 Presence of Defendant

> In all prosecutions for felonies, the defendant must be personally present at the trial, and he must likewise be present in all cases of misdemeanor when the punishment or any part thereof is imprisonment in jail; provided, however, that in all cases, when the defendant voluntarily absents himself after pleading to the indictment or information, or after the jury has been selected when trial is before a jury, the trial may proceed to its conclusion. When the record in the appellate court shows that the defendant was present at the commencement, or any portion of the trial, it shall be presumed in the absence of all evidence in the record to the contrary that he was present during the whole trial. Provided, however, that the presence of the defendant shall not be required at the hearing on the motion for new trial in any misdemeanor case.

TEX. CODE CRIM. PRO. ART. 33.03 (emphasis added).

Article 33.03 applies by its terms to bench trials, "in all cases…or after the jury has been selected when trial is before a jury." *See e.g. Papakostas v. State*, 145 S.W.3d 723, 725 (Tex. App. – Corpus Christi 2004, no pet.) citing, *Miller v. State,* 692 S.W.2d 88 (Tex. Crim. App 1985). (interpreting clause involving jury trial as modifying previous clause involving bench trial to allow *in absentia* trial after jury selected when defendant is voluntarily absent.).

Article 33.03 has been interpreted as requiring personal presence. *Weber v. State,* 829 S.W.2d 394, 396 (Tex. App. – Beaumont 1992, no pet.) ("The accused must be personally present at trial."). The statute has led to reversal when a defendant who was in jail and did not voluntarily absent himself, was not physically present for a portion of jury selection. *Sumrell v. State,* 326 S.W.3d 621, 625-26 (Tex. App. – Dallas 2009, pet. dismissed as improvidently granted).

B. Tates was not physically present in the Courtroom at the punishment phase of trial

Tates was physically present in the courtroom during the first phase of his trial in January 2020 before the COVID-19 outbreak. March 2020 brought structural changes to Texas courts occasioned by the pandemic, namely Governor Abbott's State of Disaster Declaration and the Texas Supreme Court Emergency Orders related to Court proceedings. However, separation of powers prevents either from altering or diminishing Tates' Constitutional and statutory right to be present at his trial. TEX. CONST. ART. II, § 1.

Following the conclusion of the first phase of trial on January 29, 2020, Tates' bond was revoked and a new bond amount ordered. (4 RR 47-48; CR 73). Following the revocation of existing bond and setting of new bond, two correspondences from Tates addressed to the Trial Judge, and originating from the Brazos County jail appear in the evidentiary record.

The first is dated February 18, 2020, received by the Brazos County District Clerk on February 25, 2020 and in it Tates writes he is incarcerated. (CR 74-77). A second correspondence from the jail by Tates is postmarked March 20, 2020, received by the District Clerk on March 24, 2020. (CR 77-88). The punishment phase of trial was held April 9, 2020.

Affirmative evidence that Tates was physically absent from the courtroom and appeared remotely at the punishment phase of his trial is supported by three record excerpts. The first is the Trial Court's admonishment that punishment proceedings were being viewed publicly by the internet application YouTube. (5 RR 6). Second is the following exchange of Trial Counsel's attempt to communicate with Tates in a separate Zoom internet application chat room:

> [THE COURT]: [Defense Counsel], are you ready to proceed?
>
> [DEFENSE COUNSEL]: Judge, I do -- we tried to talk to my client in the private room before the meeting. We weren't able to hook that up.
>
> [THE COURT]: Well, let's see if I can do it. Do you need to talk with him real quick?
>
> [TRIAL COUNSEL]: I do.
>
> [THE COURT]: Okay. Hold on just a second.
>
> [DEPUTY JAMES]: Your Honor, we can barely hear him.
>
> (Recess taken)
>
> [THE COURT]: I have the jail back. I think we've got everybody back except –

(5 RR 6-7).

Finally, the Trial Court specifically states that "All witnesses are appearing by Zoom." (5 RR 7). The Judge did not exclude Tates or indicate when he is sworn that Tates is physically present in the courtroom. This evidence is sufficient to meet the requirements of Article 33.03 that Tates was not present in the courtroom for the punishment phase of trial.

Tates' remote appearance at the punishment phase of his trial was not the "presence" required constitutionally or statutorily. Tates' physical absence from the courtroom prevented his ability to fully participate in his trial in ways detailed below. This appears to be a case of first impression occasioned by the unprecedented COVID-19 outbreak.

C. Tates' lack of physical presence at the punishment phase of his trial was a category one or two *Marin* right and not subject to procedural default

Trial Counsel did not object to Tates not being present in the courtroom during the punishment phase of trial. Therefore, procedural default occurred under ordinary error preservation rules unless Tates' presence was a category one or two right under *Marin v. State*, 851 S.W.2d 275, 278 (Tex. Crim. App. 1997). The Court of Criminal Appeals last wrote on categorization of *Marin* rights in *Proenza v. State* and described the three categories of rights for purposes of error preservation:

> In *Marin*, we described the Texas criminal adjudicatory system as containing error-preservation "rules of three distinct kinds: (1) absolute requirements and prohibitions; (2) rights of litigants which must be implemented by the system unless expressly waived; and (3) rights of litigants which are to be implemented upon request."17 We have since

> referred to these separate classifications as category-one, -two, and –three *Marin* rights.

541 S.W.3d 786, 792 (Tex. Crim. App. 2017).

Marin decided that "[s]ome rights are widely considered so fundamental to the proper functioning of our adjudicatory process as to enjoy special protection in the system." *Marin* at 278. This statement of law defining a defendant's right to be present, and physically so, applies here. Systemically, a defendant, of all trial participants, should be physically present while his liberty is being decided.

This inquiry is properly not harm based, but system-wide. As such, the Court of Criminal Appeals has decided defendants whose convictions resulted from statutes that were later found facially unconstitutional were able to attack their convictions though facial unconstitutionality that had not been urged at their trial. *See, e.g. Smith v. State,* 463 S.W.3d 890, 896 (Tex. Crim. App. 2015) (holding online solicitation of a minor conviction was subject to facial constitutional appeal as void based on *Marin* category one right). *Smith* explained the right of a defendant to be free from a constitutionally invalid penal sanction was a "[*Marin*] 'category one' right – a bulwark against the miscarriage of justice." *Id.*

Category two error must be read in light of *Marin* and this Court's subsequent decision regarding Article 38.05 in *Proenza*:

> [W]e note that the statute in this case is both (1) couched in mandatory terms and (2) directed at the trial judge herself. There is no ambiguity within the statute as to who bears the ultimate responsibility of compliance with this law—the language of the statute speaks for itself in

> placing this responsibility squarely upon the judge. [citing *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991]. The statute speaks neither of 'a party's request' [citing TEX. CODE CRIM. PROC. art. 39.14] nor the 'motion of the defendant,' [citing TEX. CODE CRIM. PROC. art. 38.31] but simply commands that the judge comply.

Proenza at 798.

Article 33.03 meets these criteria. The statute uses the command language "must" and is directed, if not to the trial judge, the authority directly invested in the trial court. This formulation is aptly described as a 'harm-based' theory of error preservation. *Proenza* at 794. In this case, the harm for category two is Tates' inability to communicate with Trial Counsel during the punishment phase of trial and the inability to communicate in person during his testimony.

Tates was in jail, not physically present next to Trial Counsel in the courtroom as were the rest of the trial court principles. Therefore, Tates was unable to communicate either directly or indirectly with Trial Counsel concerning testimony from the State's witnesses. He was unable to offer suggested line of cross-examination, or offer insight into testimony being offered against him. Tates did not have access to a cell phone. He was unable to stop proceedings for the necessary access to a private chat room.

Tates testified during the punishment stage. Indeed, his was the only defense testimony offered during the punishment phase of trial and was by far the longest of witnesses testifying at the second phase. Tates may have testified, but it was remotely, without the nuance and physical presence necessary to offer the remorse and

rehabilitation that was the bedrock of his testimony. There was no way for the fact-finder – the Trial Judge – to observe him from the perspective of someone five feet away as opposed to virtual appearance.

D. Constitutional and non-Constitutional harm under Rule 44.2 of the Texas Rules of Appellate Procedure

Harm under either the Constitutional or non-Constitutional standards of Rule 44.2(a) or 44.2(b) exist in this case. TEX. R. APP. PRO. Rule 44.2(a) and (b). Tates had no ability to communicate with Trial Counsel during the punishment phase of trial. More significantly, he was the only defense punishment witness. His testimony contained statements of remorse and rehabilitation. Tates was probation eligible and Trial Counsel's questions were directed toward Tates' contrition for the crime the jury convicted him of and his potential rehabilitation through community supervision:

> [TRIAL COUNSEL] So, you now fully understand what the -- what and how an enhancement paragraph works as far as evading arrest?
>
> [TATES]: Yes, sir.
>
> [QUESTION]: That didn't exist when you pled to evading arrest back in 2007, did it?
>
> [ANSWER]: No, sir.
>
> [QUESTION]: But you now -- you fully know and you fully understand and are fully aware of that?
>
> [ANSWER]: Yes, sir.
>
> [QUESTION]: Okay. And there was marijuana in the vehicle as well; is that correct?

[ANSWER]: Yes, sir.

[QUESTION]: Is that part of the reason you ran?

[ANSWER]: That's part of it.

(5 RR 70).

* * *

[QUESTION]: Are you going to avoid illegal drugs from this point forward?

[TATES]: Yes, sir.

(Id.)

* * *

[TRIAL COUNSEL]: Is there anything else that you want to tell the Judge about your position and about your change -- the changes you've made in your life that you think is important for him to know?

[TATES]: Yes, sir. I have two new grandkids; and I want to be out there for them and help them out, also. I'm a changed person.

[QUESTION]: If the Judge places you on probation, is he going to see you in here again to potentially get revoked?

[ANSWER]: No, sir.

(5 RR 71).

Trial Counsel's argument emphasized Tates' remorse and potential for rehabilitation in closing:

[TRIAL COUNSEL]: Judge, Elijah Tates is a person who's had a long history. There's no doubting -- no denying that. But we have to look at over the period of the last eight years – or I think looking at over the period of the last eight years he had this one offense. He's apologized for that. He has remorse for it.

(5 RR 92).

* * *

> And looking at the presentence investigation, no, they didn't recommend probation; but they did have recommendations to the Court that if you did see fit to put him on probation that -- that they would work with him. Those things -- those conditions of probation that they set forth are in the presentence investigation, the things that they recommended. We'd ask that you -- recommend that you do that and that you follow them.

(5 RR 94).

Trial Counsel ended his final argument with a plea that the Trial Court to place Tates on community supervision:

> [TRIAL COUNSEL]: So we'd ask the Court to consider placing him on probation -- sentencing him to ten years, probating that sentence for ten years, and placing whatever terms and conditions of probation upon him -- including that he have no contact with [ex-girlfriend] and that he have -- obviously that he have whatever treatment that the probation office recommends including whether or not they would want him to do any drug cases – drug evaluations and treatments and any anger management-type courses that the Court can place upon him. I think he's committed to doing that, and we'd ask the Court to sentence him accordingly.

(5 RR 95).

Tates' testimony was without physical presence in the courtroom. The fact-finder, in this case the Trial Court, had no ability to observe Tates' demeanor, body language, or to completely adjudge Tates' sincerity, credibility and suitability for community supervision. These are indispensable in making any sentencing decision.

The State called four witnesses, remotely, whose testimony consisted of fifty-four pages of the record (5 RR 16-60). Tates' testimony consisted of thirty-two pages of testimony. (5 RR 60-92). More important than quantification, it was he alone who

stood and was sentenced to prison time. His inability to voice in person his plea for probation was irrevocably tainted by his inability to make that plea in person. Harm, whether under the Constitutional standard of Rule 44.2(a) or non-Constitutional harm under Rule 44.2(b), resulted.

Conclusion and Relief Requested

There was a factual and legal basis for the Court to instruct the jury on Article 38.23 of the Texas Code of Criminal Procedure. The Court should reverse and remand for a new trial. Alternatively, the case should be reversed and remanded for a new punishment hearing because of Tates' lack of presence during the punishment phase of his trial.

RESPECTFULLY SUBMITTED,

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